ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers	**WT Docket No. 98-205**
Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	
Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	**WT Docket No. 96-59**
Implementation of Sections 3(n) and 332 of the Communications Act	**GN Docket No. 93-252**
Regulatory Treatment of Mobile Services	

To: The Commission

COMMENTS
OF
WIRELESS ONE TECHNOLOGIES, INC.

Comes now Wireless One Technologies, Inc. ("Wireless One") and by its attorneys, submits this its comments in response to the Notice of Proposed Rulemaking in the above proceeding, released December 10, 1998.

Introduction

Wireless One holds F Block PCS spectrum for the Fort Myers and Naples BTAs. Wireless One's principal, James A. Dwyer, has been involved in building and operating cellular systems since the 1980s. Currently, Mr. Dwyer is a principal and the chief executive officer of a company providing cellular service in small MSAs and RSAs in Florida.

The Commission indicated in its Notice of Proposed Rulemaking that it was undertaking a comprehensive review of the 45 MHz Commercial Mobile Radio Services ("CMRS") Spectrum Cap as part of its biennial review of its Regulations. The Commission requested comments on whether its should repeal, modify or retain the 45 MHz Spectrum Cap. In addition, comments were sought on a petition submitted by the Cellular Telecommunications Industry Association ("CTIA") requesting the Commission to forbear from enforcement of the CMRS Spectrum Cap pursuant to §10 of the Communications Act of 1934, as amended. For the reasons argued below, Wireless One urges the Commission to maintain the 45 MHz CMRS Spectrum Cap and to deny the CTIA Petition for Forbearance.

45 MHz Spectrum Cap Required to Ensure Competitive CMRS Marketplace

Wireless One submits that the Spectrum Cap is still necessary to ensure competition in the provision of CMRS services. The Commission adopted its CMRS Spectrum Cap in 1994 to limit the total amount of cellular, broadband personal communications service and specialized mobile radio spectrum a given entity could accumulate. See CMRS Third Report and Order, 9 FCC Rcd 7988, 7999 (1994). The Commission justified the cap "as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation." Id. at 8100. The Spectrum Cap the Commission reasoned would prevent entities from accumulating spectrum and thereby "precluding entry by other service providers." Id. at 8101. In rejecting a "case-by-case" approach to applying the

Spectrum Cap, the Commission described the cap as a "bright line test" that would provide certainty and ease the Commission's administrative burden. Id. at 8104-05.

The Commission reconsidered the cap following a remand from the United States Court of Appeals for the 6th Circuit, in a case in which the 45 MHz cap itself was not an issue but the attribution and eligibility rules were. See Cincinnati Bell Telephone Company v. FCC, 69 F.3d 752 (6th Cir. 1995). The Commission on remand eliminated the spectrum-specific caps finding that most commenters considered the 45 MHz cap adequate to avoid concentration and entry barriers. It also conducted a Herfindahl-Hirschman Index ("HHI") analysis to determine what level of concentration of ownership would result in an undesirable level of competition. The Commission in its Report and Order, 11 FCC Rcd. 7824 (1996) concluded that a Spectrum Cap was needed to avoid "excessive concentration of licenses" and to promote competition in the CMRS marketplace. Id. at 7869. Based on the record, the Commission determined that the 45 MHz cap was sufficient to guard against high concentration of the market, prevent licensees from gaining too great a competitive advantage over new entrants and furthered the goal of diversity. Id. at 7873-74.

Most recently, the Commission's rationale in support of the 45 MHz Spectrum Cap as articulated in its Report and Order, supra, was affirmed by the United States Court of Appeals for the D.C. Circuit. See BellSouth Corporation v. FCC, 1999 U.S. Appeal Lexis 205.

Wireless One submits that the application of the 45 MHz Spectrum Cap has promoted not hindered the development of competition in the CMRS marketplace. The Commission's findings of 1996 are equally valid today. The continued application of the Spectrum Cap is needed to ensure that continued progress is made towards a truly competitive mobile telephone marketplace.

While it is recognized that CMRS services do not involve the same "diversity of programming" concerns as the Commission's broadcast ownership rules, the Spectrum

Cap has nonetheless helped promote diversity of business opportunities particularly for small businesses in the growing CMRS industry. The Spectrum Cap if not applied would permit the larger players in the industry to overwhelm smaller carriers with their deep pockets. The consolidations that are occurring where large players become even larger have the potential for serious anti-competitive impact in the CMRS area. Assuming these mergers are ultimately approved and closed, the Spectrum Cap will require divestiture of CMRS spectrum in various markets thereby maintaining a competitive, viable situation in which both large and smaller carriers can compete.

The Spectrum Cap is needed to protect against market dominance by a single or handful of large carriers. In a recent article in the *New York Times*, January 11, 1999, entitled "One Nation, Unplugged," the writer highlighted the trend toward concentration in the wireless industry. Major players, the writer Seth Schiesel observed, are using their "national footprints to create leverage in the marketplace, smaller, regional carriers...are feeling the pinch." The 45 MHz Spectrum Cap is essential if small wireless carriers are to survive. The Commission in adopting its Spectrum Cap Rules in 1996, pointed out that the Spectrum Cap would further the goal of diversity. Report and Order, 11 FCC Rcd. 7824, 7873-74 (1996). Without the cap, small carriers like Wireless One would have no hope of establishing competitive services in the consolidating CMRS market. The market otherwise will be dominated by a handful of large nationwide carriers.

The auction process, even with credits for so-called designated entities designed to foster opportunities for small carriers, has been less than ideal in providing real small business participation. Few, if any, of the C Block auction winners have actually constructed systems and offered service to the public. Most of the C Block is tied up in various legal proceedings before the Commission and/or in bankruptcy courts. This situation leaves a significant void in the competitive landscape requiring maintenance of the Spectrum Cap.

The Spectrum Cap has helped ensure that larger players do not force out smaller carriers. It should be continued so that this developing competitive market can truly deliver the benefits of competition to the public.

Case-By-Case
Evaluation and Enforcement Is Not Practical

To require case-by-case determinations of permissible ownership structures places an unrealistic burden on the Commission and its staff. The 45 MHz Spectrum Cap has balanced the needs between competition and innovation and efficiency. It would be difficult if not impossible for the Commission to develop and apply in any rational way an evaluation of market and competitive forces in connection with CMRS transfers or assignments. Such an approach would provide opportunities for competitors to use the process to hold up otherwise legitimate transactions

Forbearance From Enforcing the 45 MHz
CMRS Spectrum Cap is Inappropriate
at This Time and Not in the Public Interest

CTIA has petitioned the Commission to forbear from enforcing the Spectrum Cap as provided for under §10 of the Communications Act of 1934, as amended. If the Commission should grant the forbearance, the Spectrum Cap would remain as currently codified in the Commission's Rules, but simply would not be enforced. As argued above, Wireless One believes that the 45 MHz Spectrum Cap should be maintained in its present form and that the cap is necessary to achieve the goals articulated by the Commission when the cap was adopted, i.e., to maintain a competitive CMRS marketplace and to ensure diversity in that marketplace by providing a fighting chance for small businesses to participate in the provision of CMRS services.

In any event, CTIA has failed to meet the criteria required in §10 to permit forbearance. In particular, CTIA has not shown "enforcement of such regulation or provision is not necessary for the protection of consumers" or that "forbearance from applying such provision or regulation is consistent with the public interest."

In addressing the consumer protection aspect of the forbearance criteria, CTIA has tried to show that enforcement of the cap is not necessary for the protection of consumers. CTIA contends that the Commission, pursuant to §310(d) of the Act, can evaluate spectrum combinations on a case-by-case basis.

As the Commission articulated in 1994, the Spectrum Cap is to serve as a "bright line," is to provide clear guidelines and to minimize enforcement burdens on the Commission. That rationale applies with equal force today. The Commission and its staff face significant burdens involving many wireless issues. To expect that it could handle a large number of transfers analyzing the competitive impact on a case-by-case basis is unrealistic and unfair, both to those seeking such relief as well as the public. It simply does not follow that enforcement of the cap is not necessary for the protection of the consumers. Competition is only just surfacing with the implementation of PCS services. Competition must be fostered. Maintenance of the Spectrum Cap is the way to do that at this time. Such competition will truly protect consumers providing them with a range of options with respect to service and prices.

Lastly, CTIA has not demonstrated that forbearance from applying the 45 MHz Spectrum Cap is consistent with the public interest. The Commission, in modifying the Cap in 1996, predicated its decision on a substantial competitive analysis (the HHI analysis). That analysis continues to serve as a basis for the Cap. The Commission's rationale for the Spectrum Cap was recently affirmed by the U.S. Court of Appeals for the D.C. Circuit in BellSouth v. FCC, supra. CTIA, in its Petition for Forbearance, has not challenged the Commission's factual record, and the passage of time has not rendered the Commission's analysis obsolete.

Therefore, the Petition for Forbearance should be denied so that the Spectrum Cap can continue to provide a bright line that will ensure a competitive CMRS marketplace.

Cellular Cross Interest Rule
Should Be Maintained

Section 22.94(2) of the Commission's Rules prohibits any person from having a direct or indirect ownership interest in licensees for both cellular channel blocks in overlapping cellular geographic service areas. While that Rule was adopted in 1991, it has served to promote facilities-based competition in the provision of cellular services. It should be maintained. Otherwise, the ability of a handful of large carriers to dominate geographic markets is enhanced. The 45 MHz Spectrum Cap and the cellular cross interest rule have served the public well. This is not the time to undermine the policies that have fostered competition.

Conclusion

Wireless One, for the reasons stated, submits that the 45 MHz CMRS Spectrum Cap is necessary to ensure competition in the provision of CMRS services. It should be maintained. Since the Spectrum Cap continues to serve its intended purpose of promoting competition including, among other things, projecting against market dominance by large carriers, it cannot be demonstrated that forbearance in the enforcement of the Spectrum Cap is therefore in the public interest. Accordingly, CTIA's Petition for Forbearance should be denied.

Respectfully submitted,

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Dated: January 25, 1999

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CERTIFICATE OF SERVICE

I, Gladys L. Nichols, do hereby certify that on this 25th day of January 1999, the foregoing **COMMENTS OF WIRELESS ONE TECHNOLOGIES, INC.** was served to the following persons by first-class U.S. mail, postage prepaid:

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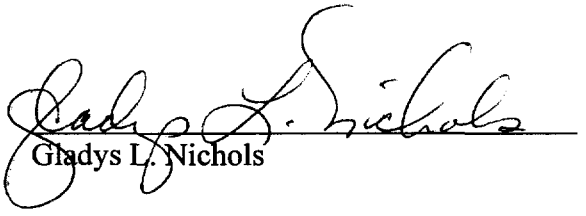

Gladys L. Nichols

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